



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

OFFICE OF THE CHAIR

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
The Leadership Forum, et al.) MUR 5338
)

STATEMENT OF REASONS

On April 2, 2003, the Commission voted 4-2¹ to accept the recommendations of the Office of General Counsel ("OGC") that the Leadership Forum and the Democratic State Parties Organizations ("DSPO") did not violate prohibitions codified in the Bipartisan Campaign Reform Act ("BCRA") that prohibit the raising and spending of soft money by national political parties.² The Commission, at OGC's recommendation, found Reason to Believe that the National Republican Campaign Committee ("NRCC") violated 2 U.S.C. §441i(a) in transferring \$1 million to the Leadership Forum. Due to mitigating circumstances, including the return of the money to the original donors, the Commission, by the same 4-2 vote, accepted OGC's recommendation to issue a letter of admonishment to the NRCC but take no further action.

This Statement of Reasons does not dispute the ultimate outcome of this matter, but rather notes our disagreement with an extraneous observation expressed in the General Counsel's report. The General Counsel's report appropriately concludes that there is no reason to believe that DSPO has committed any act in violation of BCRA. This conclusion logically flows from the simple fact that there is no reason to believe that DSPO has done anything at all since BCRA's effective date of November 6, 2002. The "no reason to believe" finding should have ended the analysis with respect to DSPO. It did not. OGC went on to examine the legal status not only of DSPO, but of a third party not notified or given an opportunity to respond. We believe this was to be unwarranted and inconsistent with our obligation to treat all parties fairly.

The issue at hand concerns affiliation, a status that attaches when one organization is directly or indirectly established, financed, maintained, or controlled by another.³ The

¹ Vice Chairman Smith, and Commissioners Mason, McDonald, and Toner voted to approve the recommendations.

² 2 U.S.C. §441a(a)(1)(B).

³ 2 U.S.C. 441i(a)(2)

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Counsel's report correctly notes that Commission "regulations state that when determining whether an organization is established, maintained or controlled by a national party committee – and thus subject to the prohibition on the use of non-Federal funds – the Commission's findings must be 'based on the entities' actions and activities solely after November 6, 2002.' 11 CFR 300.2(c)(3)."⁴ Despite its concession that there is absolutely no evidence that DSPO has engaged in any activities whatsoever after November 6, 2002, OGC goes on to conclude that DSPO is nonetheless affiliated with the DNC. It is this conclusion, unnecessary to the resolution of the Matter Under Review, with which we take issue.

OGC reaches this conclusion by relying on: statements made before November 6, 2002; a selective or subjective reading of newspaper reports; and DSPO's relationship with a third party, the Association of State Democratic Chairs ("ASDC"), which had no notice or opportunity to respond to the complaint in this matter.

We consider these purported bases for the determination in order. As OGC acknowledges elsewhere in its report, statements made before November 6, 2002 are, by definition, legally irrelevant to a determination of affiliation. While newspaper reports may provide enough evidence to initiate an investigation, we have serious concerns about the agency basing important legal conclusions on such information. Here, different press reports contain contradictory information (OGC relegates the press report that does not support its conclusions to a footnote). OGC moreover appears to rely on a document that it has not itself reviewed, although the press alludes to it.⁵ In forming its legal conclusions, the Commission, whenever possible, needs to review evidence independently, not merely accept the media's description of their contents. This is particularly so where the press description has been denied in direct statements to the Commission by participants in the meeting described.

Most troubling are the conclusions that involve ASDC. ASDC was never mentioned in the complaint or generated by the agency as a respondent, which would have afforded it notice that its own status or its relationship with a respondent might be affected by the Commission's actions in this matter. Consequently, it of course did not submit any information to the Commission and none of the other respondents mentioned ASDC in their responses.⁶ Yet the Counsel's report, drawing upon "information available at this time"⁷ not including any requests for or responses from the entity which

⁴ General Counsel's report at 1. The Counsel also correctly notes that under the Commission's regulations, the concept of "financed" is treated differently than that of "established, maintained, or controlled." If an organization receives funds prior to November 6, 2002, but is still in possession of such funds after that date, the so-called safe harbor is not applicable, and the organization or entity could be determined to be "financed" under the statute. See 11 C.F.R. 300.2(c)(3).

⁵ Specifically, OGC makes reference to a New York Times article which in turn refers to a document addressed to individuals who had previously donated to the DNC non-Federal Account "in which DSPO was described as a vehicle for continuing to raise and spend non-Federal money after BCRA's effective date." General Counsel's report at 32.

⁶ Commission practice has been to accept and consider a response to any notification afforded a respondent. In this matter, every other political committee named in the report had an opportunity to respond. OGC considered these responses, and the responses were determinative in the outcome of this case.

⁷ Counsel's report at 30-31.

is at the lynchpin of OGC's analysis, argues that ASDC is affiliated with both the DNC and the DSPO. We believe this approach raises due process concerns.

OGC's assessment that DSPO is affiliated with the DNC rests entirely on DSPO's relationship with ASDC: Because Counsel posits that the DNC is affiliated with the ASDC and Counsel further posits that the ASDC and the DSPO are affiliated, Counsel concludes that the DNC and the DSPO must be affiliated. It is the transitive theory of affiliation: if A is affiliated with B, and B is affiliated with C, Counsel believes that A must be affiliated with C. We are not convinced this necessarily follows.⁸

Nor are we comforted by the possibility that ASDC or DSPO could submit further information and seek an advisory opinion that clarifies their status. This reasoning is backward. The Commission should not suggest findings based on inadequate information and then put the onus on affected persons to correct us. We should strive to make findings only where necessary, and then only after we have heard (or at least afforded an opportunity to be heard) from all those in possession of relevant information.

Let us be clear. We are not saying that we can conclusively determine based on the evidence currently before us that DSPO is not affiliated with the DNC, but merely that we cannot and should not conclusively determine that it is. The Commission has done no independent investigation beyond checking public records; but that has been sufficient to determine that there is no reason to believe that the law has been violated. With no reason to believe the law has been violated, further investigation is unwarranted at this time. Beyond that, nothing has been determined by the Commission.

One further point requires emphasis. As OGC states: "Should the Commission adopt this recommendation and this report's reasoning, neither DSPO, the DNC, nor anyone else should make any mistake about the meaning of the finding."⁹ The adoption of this finding would mean that DSPO, as an affiliate of the DNC, would be barred from raising or spending non-Federal funds. For an entity that has disclaimed any intention to involve itself in Federal election activity, this is not an insignificant impairment. For the reasons stated, we decline to adopt the report's reasoning on the affiliation of DSPO with the DNC.¹⁰

4/24/03
Date

Ellen L. Weintraub
Chair Ellen L. Weintraub

4/24/03
Date

Scott E. Thomas (LVB)
Commissioner Scott Thomas

⁸ The fact that several state party officials are involved with several organizations may not properly translate to common control of those organizations, for example.

⁹ General Counsel's report, at 33, fn. 37.

¹⁰ We also reject the conclusion in the General Counsel's report that the DSPO is inherently subject to Section 434(e)(1), instead of Section 434(e)(2) by virtue of the affiliation findings of this report.